

NO. 44567-1-II

---

**COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON**

---

PUGET SOUND HARVESTER ASSOCIATION,

v.

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE,

Respondent,

and,

PURSE SEINE VESSEL OWNERS ASSOCIATION,

Respondent-Intervenor.

---

**RESPONDENT INTERVENOR'S BRIEF**

---

Robert F. Kehoe  
Attorney at Law  
WSBA# 21873  
1900 W. Nickerson St., Suite 320  
Seattle, WA 98119  
(206) 283-7733  
rfk@psvoa.com

ORIGINAL

FILED  
COURT OF APPEALS  
DIVISION II

2013 MAY 23 AM 11:46

STATE OF WASHINGTON

BY DEPUTY

Appellant,

## TABLE OF CONTENTS

A.	STATEMENT OF CASE.....	1
1.	Identity of Respondent-Intervenor Purse Seine Vessel Owners Association.....	1
2.	Statement of Facts.....	1
B.	ARGUMENT .....	2
1.	Standard of Review.....	2
2.	The Regulations are Consistent with WDFW's Legislative Mandate to Maintain the Economic Well-Being and Stability of the Fishing Industry.....	3
3.	PSHA Has Not Demonstrated Any Economic Harm to the Gillnet Fleet.....	4
4.	PSHA's Allegations of a Conspiracy Between WDFW and Purse Seine Representatives are Baseless.....	6
5.	PSHA's Challenge Involves Policy Issues, Not Legal Issues.....	7
C.	CONCLUSION .....	8

## TABLE OF AUTHORITIES

### **Cases**

<i>Hillis v. Department of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997)....	7
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	3
<i>Puget Sound Crab Ass’n v. State of Washington</i> , No. 42718-4-II, slip. op. (Div. II, April 23, 2013) .....	7
<i>Puget Sound Harvesters Ass’n v. Washington State Dep’t of Fish and Wildlife</i> , 157 Wn. App. 935, 239 P.2d 1140 (2010).....	4
<i>Rios v. Department of Labor &amp; Indus.</i> , 145 Wn.2d 483, 39 P.3d 961 (2002).....	3

### **Statutes**

RCW 77.04.012 .....	4
---------------------	---

**A. STATEMENT OF CASE**

1. Identity of Respondent-Intervenor Purse Seine Vessel Owners Association.

The Purse Seine Vessel Owners Association (“PSVOA”) is a non-profit trade association, which is comprised of commercial fishing vessel owners. Many PSVOA members hold Puget Sound commercial purse seine licenses.

PSVOA participated in the public hearing process which led to the adoption of the rules pertaining to the 2012 Puget Sound commercial fishing schedule for gillnets and purse seines which is the subject of the instant appeal. During the public hearing process, PSVOA generally supported the 2012 fishing schedule, which is similar to the schedules previously adopted for the 2008-2011 seasons.

PSVOA sought to intervene in the case to defend the challenged rules at issue. Appellant Puget Sound Harvesters Association (“PSHA”) and Respondent Washington Department of Fish and Wildlife (“WDFW”) both stipulated to PSVOA’s intervention, and an order was entered granting PSVOA’s motion to intervene.

2. Statement of Facts.

In its brief, PSHA discusses some of the differences between purse seines and gillnets in terms of the gear and vessels used by each group. App. Br., at p.4-5. PSHA correctly points out that purse seiners use larger

vessels than gill nets. *Id.* The use of larger vessels requires purse seiners to hire (and pay) more crewmembers to operate their vessels in the salmon fishery than gillnetters. Larger vessels translate into higher fixed operating costs for purse seiners compared to gillnetters. These higher fixed costs include fuel, vessel maintenance and repairs, hull and liability insurance, and moorage. AR 3681.

## **B. ARGUMENT**

### **1. Standard of Review.**

PSVOA generally concurs with PSHA that the trial court's denial of PSHA's challenge brought under the Administrative Procedures Act ("APA") is to be reviewed by this Court *de novo*. App. Br., at p. 10. In reviewing an agency's rule, this Court undertakes the same review as the superior court by applying the APA standards directly to the agency's administrative record. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004).

PSHA bears a heavy burden of proof under the "arbitrary and capricious" standard. In order for PSHA to prevail under the arbitrary and capricious standard, PSHA must clearly show that WDFW's action "is willful and unreasoning and taken without regard to the attending facts or circumstances." *Port of Seattle*, 151 Wn.2d at 589. In reviewing agency rulemaking, courts accord particular deference to an agency's

determinations where, as in the present case, they are based heavily on factual matters, especially those which are complex or involve agency expertise. *Rios v. Department of Labor & Indus.*, 145 Wn.2d 483, 501-02, n.12, 39 P.3d 961 (2002).

2. The Regulations are Consistent with WDFW's Legislative Mandate to Maintain the Economic Well-Being and Stability of the Fishing Industry.

PSHA's objection to WDFW's rulemaking is yet another in a series of legal challenges brought by PSHA in the pursuit of a higher allocation of chum salmon in central and south Puget Sound (Area 10 and 11) to the non-treaty gillnet fleet. At the outset it is important to note that chum salmon, like other state natural resources, is a finite resource. Therefore, any increase in the allocation to the non-treaty gillnet fleet would necessarily result in a decrease in the allocation to the purse seine fleet. Any decrease in the purse seine allocation would have a negative economic impact on the purse seine fleet.

PSHA maintains the challenged regulations do not provide for "an equitable allocation of fish" to the gillnet fleet. App. Br., at p. 2. However, PSHA fails to define in its brief what it deems is an "equitable allocation of fish" for the gillnet fleet. Equity, like beauty, is in the eye of the beholder.

The 2012 fishing schedule for Area 10 and 11 is based on several factors including the economic well-being of the commercial fishing industry. RCW 77.04.012. PSHA challenges WDFW's practice of allocating a larger share of the harvestable non-treaty share of chum salmon in Area 10 and 11 to the purse seine fleet. App. Br., at 14.

As mentioned above, purse seiners have higher fixed operating costs than gillnetters. Accordingly, from an economic stand point, it is completely rational and consistent with the agency's legislative mandate for WDFW to allocate a higher proportion of the non-treaty share to the purse seine fleet. Indeed, as this Court previously observed, a 50 -- 50 allocation among the two gear groups without regard to attending facts and circumstances, including the different economics of each group, would be arbitrary and capricious. *Puget Sound Harvesters Ass'n v. Washington State Dep't of Fish and Wildlife*, 157 Wn. App. 935, 950, 239 P.2d 1140 (2010).

3. PSHA Has Not Demonstrated Any Economic Harm to the Gillnet Fleet.

PSHA asserts that "as the economics of fishing are becoming increasingly difficult on gillnet license-holders," WDFW's failure to increase the gillnet allocation of chum salmon in central and south Puget Sound is arbitrary and capricious. App. Br., at p. 33. Not only does

PSHA fail to cite anything in the record which supports the notion that the gillnet fleet is somehow struggling economically, there is ample evidence in the record to the contrary.

For example, PSHA's own consultant, Stephen Matthews, states "Puget Sound chum salmon is a growing and valuable resource, primarily commercial." AR 2842. According to Matthews, "[n]ot only has abundance increased over the three recent decades, but so has the economic value in real dollars per pound," with prices paid to fishermen exceeding one dollar per pound compared to eight to ten years ago when prices were a fraction of current prices. *Id.* Matthews goes on to state that higher fish prices combined with the reduction of gillnet licenses through attrition and license buyback programs have "resulted in seasonal catch values per gill net boat of \$10,000 - \$20,000" or more, which are "significant add-ons" for gillnetters who participate in commercial fisheries in other areas or are employed in other shore side jobs. AR 2843.

WDFW's data confirm Matthews' opinions regarding the dramatic improvement in recent years of the economics of the chum salmon fishery for gillnets in Puget Sound. According to WDFW, the total gillnet ex-vessel value has steadily increased beginning in 2003 through 2011. AR 3681, 3685. Moreover, the ex-vessel value per gillnet license (adjusted for inflation) in 2011 was the second highest on record since 1973. AR 3681.



In sum, like the reports of Mark Twain's death<sup>1</sup>, PSHA's allegations concerning the purported economic demise of the Puget Sound gillnet fleet are greatly exaggerated.

4. PSHA's Allegations of a Conspiracy Between WDFW and Purse Seine Representatives are Baseless.

Lacking any evidence in the administrative record supporting its position that WDFW's rule is arbitrary and capricious, PSHA resorts to making inflammatory allegations of an ongoing conspiracy between WDFW and representative of the purse seine fleet. PSHA states that WDFW is "focused primarily on protecting the allocation and profit for the purse seine fleet." App. Br., at p. 31. While PSVOA acknowledges it did object to PSHA's request for an increased allocation during the public rulemaking process, there is ample evidence in the administrative record supporting WDFW's rule.

PSHA's accusation of a conspiracy between WDFW and purse seine representatives designed to somehow suppress the gillnet harvest is absurd, and only serves to further highlight the absence of any factual basis in the record in support of PSHA's contention the challenged rule is arbitrary and capricious.

---

<sup>1</sup> "[T]he report of my death was an exaggeration." Reported by Frank Marshall White, "Mark Twain Amused," *New York Journal*, 2 June 1897.

5. PSHA's Challenge Involves Policy Issues, Not Legal Issues.

PSHA's ultimate objective in its repeated legal challenges to WDFW's rulemaking is to secure a larger allocation of Puget Sound chum salmon for the gillnet fleet at the expense of the purse seine fleet.

Allocation disputes between competing user groups of a finite natural resource are perhaps one of the most contentious and challenging issues agencies such as WDFW are tasked with resolving. *See e.g. Puget Sound Crab Ass'n v. State of Washington*, No. 42718-4-II, slip. op. (Div. II, April 23, 2013) (dispute between recreational and commercial user groups concerning allocation of harvestable Puget Sound Dungeness crab).

In general, few, if any, allocation disputes involve true legal issues for a court to decide. The instant case is no exception to the general rule. Moreover, courts are not well equipped to decide such matters. Indeed, the APA and case law interpreting it instruct reviewing courts to give great deference to an agency's determinations when they are based heavily on complex factual matters within an agency's area of expertise, such as the allocation of a natural resource between competing user groups. *Hillis v. Department of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997).

In sum, PSHA's challenge, like most allocation disputes, involves policy issues rather than legal issues. With all due respect to this Court,

policy issues are within the purview of the Legislature and the agencies entrusted with carrying out the Legislature's mandate, not the courts.

**C. CONCLUSION**

For the foregoing reasons, PSVOA respectfully requests this Court affirm the trial court's denial of PSHA's petition challenging WDFW's 2012 Regulations for non-tribal commercial chum salmon fishing in Area 10 and 11.

RESPECTFULLY SUBMITTED this 22 day of May, 2013

ROBERT F. KEHOE, ATTORNEY  
AT LAW

By: 

Robert F. Kehoe, WSBA: #21873  
Attorney for Respondent-Intervenor

1900 W. Nickerson St., Suite 320  
Seattle, WA 98119  
(206) 283-7733  
rfk@psvoa.com

NO. 44567-1-II

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON, DIVISION II**

PUGET SOUND HARVESTERS  
ASSOCIATION,

Appellant,

vs.

WASHINGTON DEPARTMENT OF FISH  
AND WILDLIFE,

Respondent,

and

PURSE SEINE VESSEL OWNERS  
ASSOCIATION,

Respondent-Intervenor.

**CERTIFICATE OF SERVICE**

FILED  
COURT OF APPEALS  
DIVISION II  
2013 MAY 23 AM 11:46  
STATE OF WASHINGTON  
BY WA  
DEPUTY

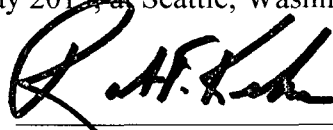
I herby certify that on May 22, 2013, I served counsel of record  
with a true and correct copy of the following document: Respondent  
Intervenor's Brief  
by causing the same to be delivered via U. S. Mail as follows:

David Mann  
Gendler & Mann LLP  
1424 4th Ave Ste 715  
Seattle, WA 98101-2297

Joseph Panesko  
Attorney General's Office  
P.O. Box 40100  
Olympia, WA 98504-0100

I further certify that all parties required to be served have been served. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of May 2013, at Seattle, Washington.

A handwritten signature in black ink, appearing to read "R. F. Kehoe", written over a horizontal line.

Robert F. Kehoe